

My Client, the Cooperator, Lied: Now What?

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More than forty years ago, the Chief Justice of the U.S. Supreme Court called for the disbarment of ethicist Monroe Freedman for publicly espousing the view that criminal defense lawyers should present the client's false testimony in the same manner as any other testimony.¹ In his famous "Three Hardest Questions," Freedman carefully considered the lawyer's trilemma—the duty to know everything about the case, to keep the client's confidences, and to reveal perjury to the court—and concluded that such a course was the best ethical choice once a lawyer first unsuccessfully remonstrated with the client.

The Freedman resolution was, and by many accounts, remains consistent with the beliefs and practice of the overwhelming number of criminal defense lawyers—notably for indigent clients. This is true despite the fact that the Model Rules, adopted by nearly all jurisdictions, elevated candor toward the tribunal over client confidentiality. Model Rule 3.3, and its state variations, requires that a lawyer who *knows* that his client has offered materially false testimony to take "reasonable remedial measures," even if doing so require revelation of client confidences. Despite the purported clarity of the rule, the debate about the lawyer's obligation continues. Few lawyers ever obtain the requisite "actual knowledge" of client intended or completed perjury that triggers the rule's obligation. When, however, that level of knowledge exists, what must, may, or should a lawyer do? Is withdrawal necessary? If so, is it sufficient?

The three hardest questions became more complicated with the advent of the Federal Sentencing Guidelines in 1986. These guidelines, with the goal of national uniformity in sentencing, became a much-criticized system that vested greater powers in prosecutors and tied the hands of sentencing judges. "Cooperation" with federal prosecutors became the coin of the realm, notably in drug cases. This was because a prosecutor's acknowledgement to a court that a defendant had provided "substantial assistance" was the sole vehicle for a defendant to obtain a sentence not only below a guideline range, but below the lengthy statutory mandatory minimum sentence. The practice of law became a "race to the courthouse" with the first defendants in the door typically receiving the coveted 5K1.1 letter and the

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¹ Warren G. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11 (1966); Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133, 133 & n.1 (2008).

likelihood of a significantly lower sentence. Needless to say, such a culture produced a variety of distortions including, of course, defendants lying or embellishing to obtain the benefit of cooperation.²

Yet it is curious that while ethicists reinforce that ethical choices must be viewed in context, rarely are a lawyer's ethical obligations understood clearly in the context of this cooperation culture.

The criminal defense lawyer's initial obligation in a federal drug case is to establish a trusting lawyer-client relationship despite all obstacles. Time is of the essence. The cooperation system causes yet another dilemma: the obligation to learn all of the facts and investigate fully versus the time-constrained obligation to be the first in line to obtain a 5K1.1 letter. The lawyer must explain the federal system with its mandatory minimum sentences and guideline ranges. She has an obligation to present this information while walking the tightrope of establishing trust. If the client is new to the federal criminal justice system, it is difficult enough to believe that her court appointed counsel is trustworthy and one to whom she should reveal confidences within the initial meetings, no less a suggestion that her best option is to provide information about herself and others to the agents who arrested her and the prosecutor who indicted her. The lawyer culture may term this "cooperation" or substantial assistance. In common parlance it is "snitching" or "ratting out" others. It rarely is done willingly. It is potentially life threatening, otherwise dangerous, and has serious social and psychological consequences.

Many clients, knowing that cooperation is their only hope, raise the issue in the first meeting with the lawyer. The jailhouse grapevine provides clients with information about cooperation, including the fact that cooperation against the lawyer may secure significant benefits.³ The zealous advocate must have self-protective instincts. The system causes such distortions and some clients will take full advantage of those to the lawyer's detriment.

The lawyer may morally oppose a system that relies primarily on snitches, but nevertheless has an obligation to present the possibility of cooperation to the client in a "timely fashion."⁴ Of course, the lawyer must explain the advantages and pitfalls. Not all cases provide the client with sufficient benefit for attempting to cooperate. The government may decide that the information is not sufficiently helpful, or that the client is not worthy of belief. The fact that, as a precondition of

² I have previously explored this issue through interviews with prosecutors in the Southern District of New York. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999); see also Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999).

³ Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QUINNIPAC L. REV. 151, 205-10 (2004) (discussing the prosecution of attorney Patrick Hallinan based on a drug conspiracy client who falsely implicated the lawyer).

⁴ United States v. Fernandez, No. 98 CR. 961 JSM., 2000 WL 53449 (S.D.N.Y. May 3, 2000); but see Barry Tarlow, *The Moral Conundrum of Representing the Rat*, The Champion, Mar. 2006, at 64 (arguing that the moral repugnance to the degradation of the criminal system through the use of informants is reason for lawyers ethical choice to refuse to represent informants).

cooperation, the client will have to reveal all of her conduct throughout her life is a factor that weighs heavily on the decision to cooperate.

The lawyer should consult the client as extensively as possible prior to the time she engages the government in exploring cooperation, explaining to her the necessity to provide information that the government deems truthful and complete. The lawyer engages in a dance with the prosecution in exploring the information it seeks from the client to gauge whether an agreement is likely. Knowing that the government is interested in the kingpin, the lawyer has an obligation to discuss this with the client, even if she suspects or believes that the client might be tempted to commit perjury if she testifies against him. Temptation is not a sin, nor does it give rise to an ethics violation. The lawyer, as zealous advocate, must explain (and re-explain) to the client the real world consequences of cooperation—the punishment for falsity, misrepresentation or omission of facts during the cooperation process and in any subsequent testimony.

When a client enters into cooperation with the prosecutor, she wins the chance for a 5K1.1 letter, provided that the government finds her cooperation to be truthful. Thereafter, typically she meets on many occasions with the prosecution and/or agents. Her lawyer may not attend all of those sessions. Providing false information to the government can result in a criminal charge for false statements⁵ or obstruction of justice.⁶

Let's say that at some point before the kingpin's trial, however, the cooperating client tells her lawyer that her testimony "will be all lies" and that she has "figured out what those prosecutors wanted her to say and she was prepared to say it." When she amplifies, the lawyer believes that she is telling the truth about her plan not to tell the truth.

I. WHAT DO I "KNOW"

Alarm bells ring. Is the lawyer's "belief" "actual knowledge" that triggers an ethical obligation? This is unlikely to be a case of the ethically impermissible conscious avoidance of the truth.⁷ The defense lawyer is probably the last to know what statements are false or whether the client intends to perjure herself.

No matter the extent of preparation for proffer sessions, defense lawyers are often surprised by some of the facts that emerge during those sessions. Contradictions abound. The lawyer may not be present during all of the proffer sessions in which case, she certainly does not *know* the truth about statements made, the areas explored by the prosecution or other information regarding the client's prospective testimony about the kingpin. If present, the lawyer may be the

⁵ 18 U.S.C. § 1001 (2006).

⁶ 18 U.S.C. § 1501 (2006).

⁷ See, e.g., *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964) (conscious disregard as knowledge).

person in the room with the least amount of knowledge about whether the client's statements are false.

Even if the client says that she provided false statements to the prosecution during the proffer session, the lawyer may have no independent knowledge of the falsity. It may be untrue that she intends to testify falsely. Maybe the client wants the lawyer to believe that she is "tough" and will willingly lie for others. Maybe she wants her attorney to believe that she is compelled to testify when she actually chooses to cooperate. Maybe the fear of the danger of testifying has led her to recant. Maybe she has a hidden agenda. The lawyer does not know, nor in these circumstances is likely to obtain "actual knowledge" of falsity. Cooperators, with conflicting emotions, may seek to rationalize their cooperation with the government and engage in denial. For all the lawyer knows, the government may have knowledge that the facts are accurate even if the client tells her lawyer that these are "lies." Thus, the lawyer's "belief" that her protestations are truthful are just that—beliefs.

On the other hand, the lawyer may be wary of the client who "confesses" that she lied to the government. It is a rare occurrence that a client tells the lawyer that she intends to testify falsely, thus caution is advised as to whether the client intends to "set up" the lawyer or is having significant problems with cooperation.

However, even absent actual knowledge, the lawyer's belief is significant for tactical and strategic reasons. The lawyer is obligated to counsel the client with persuasive techniques about the minefield she walks on if she, in fact, intends to provide false testimony. She faces loss of her hoped-for 5K1.1 agreement, a lengthy and enhanced prison sentence, potential criminal charges for false statements, obstruction of justice, and perjury.

The ethical obligation is to be a steadfast, thoughtful, zealous advocate and counsel the client diligently and, hopefully, persuasively. The client may lack an understanding of the precarious situation she faces. She may be fearful. Maybe she believes that she will be able to testify and be perceived as truthful. Perhaps she is correct, but it is the lawyer's obligation to counsel her. Hopefully, the attorney comes to understand why she has made a "confession" that she will lie. Maybe the lawyer remains guarded but hopefully not. The lawyer hopes that the client heeds her advice and provides truthful testimony.

II. WHAT IF I KNOW?

What happens, however, if in an atypical case, the lawyer develops "actual knowledge" that the client has presented false information to the government, and that she does intend to testify falsely at the kingpin's trial?

The first obligation is one of remonstrance. Hopefully this persuasive technique will encourage her to correct the information that she has provided to the government. The lawyer should firmly explain the perilous consequences she faces if she does not correct the information, including the withdrawal of her

counsel.⁸ The lawyer may bring in a second lawyer to reinforce her advice. If the client agrees to correct her statements, the lawyer should navigate a relatively graceful correction process. Lawyers should not underestimate the ability to repair damage done during some cooperation sessions, notably because the witness is key to the government's case.

If, however, the client refuses to correct the prior false statements, continues to meet with the government in preparation for her testimony, and the lawyer continues to counsel the client, the lawyer may run afoul of Rule 1.2(d) (assisting an ongoing crime or fraud) if she does not withdraw.⁹ She may also be a necessary witness in any future criminal prosecution of her client as a result of her participation in the proffer sessions.¹⁰ The necessary and most prudent course of action is to seek withdrawal from representation. Perhaps another lawyer will more successfully assist the client in avoiding catastrophic consequences. Withdrawal is likely to be required under Rule 1.16(b)(2).¹¹

Must the lawyer take other measures? Rule 3.3(b), which arguably applies, does not adequately address this circumstance. That rule provides: "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."¹²

The letter of the rule requires such action only in an adjudicative proceeding. Arguably, because the lawyer represents the client in a different proceeding from the one in which the lawyer knows that her client has offered false information and will offer false testimony, she has no ethical obligation to act in the kingpin's trial. She is now a lawyer for a witness in a case with little control over that process. She is neither offering her client's testimony to a court nor assisting her in preparing the testimony. The client is now the agent of the prosecution and the government bears responsibility for ensuring that the testimony is truthful.

Nor does the rule clearly impose a current obligation on the lawyer to the tribunal that will accept her client's guilty plea if it is not clear that the client will engage in a crime or fraud related to that proceeding.

Second, the rule does not specify the timing of such remedial measures. Even if the rule were applicable to the kingpin's trial, remedial measures may be premature. The kingpin may plead guilty, thereby avoiding a trial. The cooperator may not be called to testify. Or, if the case continues, the client may change her mind the moment before testifying or as she takes the stand. Although concern for the integrity of the criminal justice system argues for revelation of the intended

⁸ See *infra* note 16 on withdrawal as an option.

⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

¹⁰ MODEL RULES OF PROF'L CONDUCT R. 3.7(b) (2009).

¹¹ MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(2) (client persists in a course of criminal conduct involving the lawyer's services).

¹² MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2009).

perjury as soon as it is known by the lawyer,¹³ the unique context of cooperation suggests that no remedial action be contemplated until the testimony is reasonably certain.

However, the lawyer, consistent with a more likely reading of Rule 3.3 and the strategic best practice, may choose, after client consultation, to take the remedial measure of telling the prosecution that the client should not enter into a cooperation agreement without specifying details.¹⁴ The message to the government is clear. However, few clients would continue to trust a lawyer who has revealed this or any further information to a court or prosecutor without consent. This consequence of breakdown in the lawyer-client relationship demonstrates why withdrawal—without additional remedial measures—may be a better option for resolution of these intractable issues.

While withdrawal has been criticized as an option that only passes the problem to the next lawyer, and does not protect the integrity of the criminal justice system, it is the one that best preserves the delicate balance between client confidentiality and a lawyer's duty to the system.¹⁵

Nevertheless, the ethics rules require reasonable remedial measures, presumably not withdrawal. The contours of such measures include "mak[ing] such disclosure to the tribunal as is reasonably necessary to remedy the situation" including information that is otherwise protected as confidential information.¹⁶ However, no court has yet determined that revelation of client confidences is consistent with the client's Fifth Amendment right against self-incrimination.¹⁷ Consequently, a lawyer who withdraws but does not provide further information to the court or the government has a reasoned argument that this position is consistent with the client's Fifth Amendment right against self-incrimination.¹⁸ The indigent defender version of the "noisy withdrawal" ought to be sufficient for the integrity of the criminal justice system.¹⁹

¹³ GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 29.15 (3d ed. Supp. 2010).

¹⁴ MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009).

¹⁵ Ethicists have, and will continue, to differ on this point. See Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988) (arguing that withdrawal merely passes the buck); John Wesley Hall, Jr., *Handling Client Perjury After Nix v. Whiteside: A Criminal Defense Lawyer's View*, 42 MERCER L. REV. 769 (1991) (advocating withdrawal). See also Hazard & Hodes, *supra* note 13, § 29.16 (withdrawal does the least damage of competing policies).

¹⁶ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt.10 (2009).

¹⁷ See Freedman, *supra* note 15. But see Hazard & Hodes *supra* note 13, § 29.20 (arguing that the Fifth Amendment argument is "unpersuasive").

¹⁸ Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008).

¹⁹ In prior versions of Rule 1.6 commentary, "noisy withdrawal" (without disaffirmance) in the corporate context was understood to be an acknowledgement of fraudulent conduct.

The prevalent use of informants and cooperating witnesses and the culture of cooperation have led to a profound discomfort among many criminal defense lawyers about their role as zealous advocates for the client. The ethical choices are often difficult for the criminal defense lawyer and can only properly be discussed in tandem with the issue of the prosecutor's obligation to "do justice" in the context where there are so few guidelines for their discretion.²⁰ This problem focuses upon the criminal defense lawyer's ethical responsibilities, but ultimately the issue is one for prosecutors as well. Ethics rules and laws should focus upon the proper use of such informants, seeking to ensure that the police and prosecution present truthful testimony from cooperators.

²⁰ Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607, 608 (1999).

